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In re Application of	:	
DAFNI, Ehud, et al.	:	
U.S. Application No.: 09/380,654	:	
PCT No.: PCT/IL98/00074	:	
International Filing Date: 12 February 1998	:	DECISION ON
Priority Date: 20 February 1997	:	PETITION FOR CONSIDERATION
Attorney's Docket No.: 043/01136	:	AND/OR REVIVAL UNDER
For: REAL-TIME DYNAMIC IMAGE	:	37 C.F.R. 1.137(b)
RECONSTRUCTION	:	

This decision is issued in response to the "Petition For Consideration And/Or Revival Under 37 CFR 1.137(b)" filed on 17 August 2000. Applicants have paid the petition fee.

### **BACKGROUND**

The procedural background for this decision is set forth in detail in the decision mailed 14 June 2000. In that decision, this Office dismissed applicants' petition to change the filing date assigned to the materials submitted to initiate this national stage application. The dismissal was based on applicants' failure to satisfy the requirements of 37 CFR 1.10(c). Specifically, applicants had failed to place the number of the Express Mail mailing label on the materials submitted, as required by 37 CFR 1.10(c)(2).

On 17 August 2000, applicants filed the "Petition For Consideration And/Or Revival Under 37 CFR 1.137(b)" considered herein.

### **DISCUSSION**

#### **A. Petition For Reconsideration**

Applicants argue that the "only" reason these application materials were not assigned the desired filing date was "a procedural error within the mailroom at the Patent Office." In fact, as set forth in the previous decision, it is applicants' failure to follow the procedures set forth in 37 CFR 1.10 regarding the use of Express Mail for USPTO filings which precludes the correction of the filing date sought by applicants here.

Section 513 of the MPEP specifically addresses these circumstances and states that relief is not available by petition:

Since the filing of correspondence under 37 CFR 1.10 without the number of the "Express Mail" mailing label thereon is an oversight that can be avoided by the exercise of reasonable care, requests for waiver of this requirement will not be granted on petition. A party's inadvertent failure to comply with the requirements of a rule is not deemed to be an extraordinary situation that would warrant waiver of a rule under 37 CFR 1.183, 2.146(a)(5) or 2.148, nor is such an inadvertent omission considered "unavoidable" within the meaning of 15 U.S.C. 1062(b), 35 U.S.C. 133, 37 CFR 1.137(a) or 37 CFR 2.66(a).

Based on the above, the previous decision dismissing applicants' petition to change filing date remains in effect.

**B. "Petition To Revive Under 37 CFR 1.137(b)"**

The present petition also includes a petition to revive the application under 37 CFR 1.137(b). 37 CFR 1.137(b) permits the filing of a petition to revive an abandoned application where the abandonment resulted from an unintentional delay. A grantable petition under this section must include: (1) the required reply, unless previously filed; (2) the petition fee required by law; (3) a statement that the "entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unintentional;" and (4) any terminal disclaimer and fee required pursuant to 37 CFR 1.137(c).

Regarding item (1), the "required reply," section 711.03(c) of the MPEP states that:

[g]enerally, the required reply is the reply sufficient to have avoided abandonment, had such reply been timely filed.

Here, a copy of the international application had previously been transmitted to the USPTO by the IB. The "required reply" was therefore payment of the basic national fee. The transmittal letter filed by applicant on 24 August 1999 included the authorization to charge Deposit Account No. 03-3419 for \$1,212 (\$840 as the basic national fee, \$216 for inclusion of 12 extra claims, and \$156 for inclusion of two extra independent claims. Thus, applicants have made a submission which would have been "sufficient to have avoided abandonment" had it been made in a timely manner, that is, on or before 20 August 1999. Accordingly, applicants have submitted the "required reply." Item (1) is satisfied.

Item (2) is the petition fee required under 37 CFR 1.17(m). The present petition was accompanied by a check in the amount of \$1,210 for the petition fee. Item (2) is satisfied.

As for item (3), the present petition expressly states that the "entire delay in filing the above application from the due date for the National Stage filing until the filing of a grantable petition to revive pursuant to 37 CFR 1.137(b) was unintentional." Item (3) under 37 CFR 1.137(b) is satisfied.

Under the terms of 37 CFR 1.137(c), the terminal disclaimer listed as item (4) above is not required for this application. Applicants have therefore satisfied all the requirements for a grantable petition under 37 CFR 1.137(b). The petition to revive is granted.

### CONCLUSION

Applicants' petition for reconsideration of the decision mailed 14 June 2000 is **DISMISSED** without prejudice.

Applicants' petition to revive under 37 CFR 1.137(b) is **GRANTED**.

This application is being forwarded to the National Stage Processing Branch of the International Division for further processing in accord with this decision, including mailing of a Notification Of Missing Requirements (Form PCT/DO/EO/905) requiring submission of an executed declaration and the surcharge for filing the declaration after the thirty month deadline.



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